Supreme Court of the United States

October Term, 1973
No. 73-108

ALDEN G. HANSEN,

Petitioner,

vs.

UNITED CALIFORNIA BANK,

Respondent.

In the Matter of ALDEN G. HANSEN,

Bankrupt.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF OF RESPONDENT IN OPPOSITION.

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BRIEF OF RESPONDENT IN OPPOSITION.

Opinions Below.

The judgment and findings of the Referee in Bankruptcy are unreported but appear at pages 14-20 of the Record. (All citations to the "Record" refer to the Record on Appeal in the Court of Appeals.) The District Court for the Central District of California on petition for review affirmed the judgment of the Referee in Bankruptcy; its order is found at page 53 of the Record. The opinion of the Court of Appeals for the Ninth Circuit is unreported but is found as Appendix C to the Petition for Writ of Certiorari herein. The or-

der of the Court of Appeals for the Ninth Circuit denying Petition for Reconsideration and/or Rehearing is similarly unreported and is found as Appendix D to the Petition for Writ of Certiorari herein.

Jurisdiction.

The basis for this Court's jurisdiction is set forth in the Petition for Writ of Certiorari herein.

Question Presented.

Whether the courts below clearly erred in determining that respondent's claim against petitioner is based upon a willful and malicious conversion of property, and is thus nondischargeable in bankruptcy.

Statutory Provision Involved.

Bankruptcy Act, Section 17a(2) [11 U.S.C. §35a (2)]:

> "(a) A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as . . . (2) are liabilities . . . for willful and malicious conversion of the property of another. . . ."

Statement.

In February 1969 respondent United California Bank entered into an accounts receivable financing agreement with Hibbs Precision Sheet Metal, Inc. (hereinafter referred to as "Hibbs") under which respondent obtained a security interest in all the Hibbs accounts receivable and proceeds thereof. Petitioner, the president and sole shareholder of Hibbs, personally guaranteed the corporation's obligation.

Despite the contract provision that all collections of receivables would be held in trust for respondent, petitioner in July 1970 diverted a total of $26,950.94 of Hibbs' customer checks into his attorney Sylvan Y. Allen's trust account. All of the funds from this trust account were subsequently disbursed to labor claimants, tax claimants and other creditors of Hibbs at the direction of petitioner, except that two checks in the respective amounts of $6,854.96 and $2,102.54 were made payable to Hibbs and delivered to petitioner. He held them in his possession for over a month before returning the money to the Hibbs bank account from which it was again used for purposes other than paying respondent. Prior to the distribution of any funds from the trust account, both Allen and petitioner had specific knowledge of respondent's claim to the money, but the demands by respondent for remittance of the accounts receivable proceeds were ignored.

On April 7, 1971, voluntary petitions in bankruptcy were filed for Hibbs and petitioner. On May 19, 1971, respondent filed in petitioner's bankruptcy proceeding an application under §17c(2) of the Bankruptcy Act [11 U.S.C. §35c(2)], to obtain a determination that its claim against petitioner to the extent of $26,950.94 was nondischargeable as a debt arising from a willful and malicious conversion of property. Bankruptcy Act §17a(2) [11 U.S.C. §35a(2)]. On August 19, 1971, after a full hearing, the Referee in Bankruptcy determined respondent's claim to be nondischargeable and entered judgment for respondent in

the amount of $26,950.94. On March 6, 1972, the District Court, on petitioner's review, affirmed the judgment of the Referee in Bankruptcy. Notice of Appeal to the Ninth Circuit was filed March 16, 1972, and the Court of Appeals affirmed the District Court on February 28, 1973. Petitioner's Petition for Reconsideration and/or Rehearing was denied by the Court of Appeals on April 16, 1973. The Petition for Writ of Certiorari was filed on July 12. 1973.

ARGUMENT.

There Is No Important Federal Question Involved in This Case. The Courts Below Merely Found the Facts Against Petitioner, and Then Properly Applied Long Established Legal Principles in Harmony With Decisions of This Court.

There is no merit to petitioner's contention that the holding below is inconsistent with this Court's decision in *Davis v. Aetna Acceptance Co.*, 293 U.S. 328 (1934). In that case, a bankrupt's mere technical conversion of a secured party's collateral was held not willful and malicious for dischargeability purposes. The present case, however, factually involves actual willfulness and malice in the conversion of respondent's security, not simple conversion *per se*.

The findings below are:

> "Alden G. Hansen [petitioner] had knowledge of the demand of the United California Bank for the remittance of the accounts receivable proceeds held by the bank as security for its debt and willfully, wantonly and maliciously refused to turn over to the United California Bank the aforesaid accounts receivable proceeds.
>
> "Alden G. Hansen has intentionally, willfully and maliciously converted the property of the United California Bank, to-wit: accounts receivable proceeds in the sum of $26,950.94 to his own use and benefit."
>
> [Petition for Writ of Certiorari, Appendix A, Findings of Fact 14 and 15, p. 4].

Thus, this case is like *McIntyre v. Kavanaugh*, 242 U.S. 138 (1916), where the Court held the conversion

claim nondischargeable. *McIntyre* was expressly approved by this Court in its *Davis* decision upon which petitioner relies:

> "There is no doubt that an act of conversion if willful and malicious, is an injury to property within the scope of this exception. Such a case was *McIntyre v. Kavanaugh* [citation omitted] where the wrong was unexcused and wanton." 293 U.S. 332.

Essentially, petitioner attacks the findings of fact with respect to the issue of willfulness and malice. But these findings cannot be overturned as clearly erroneous [*Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271 (1949); *Pick Mfg. Co. v. General Motors*, 299 U.S. 3 (1936)]; indeed, they are not erroneous at all. As the record indicates, petitioner set out knowingly and purposefully to divert accounts receivable collections so as to deprive respondent of its rights in the collateral. Petitioner was aware of the existence of a security interest in favor of respondent United California Bank [RT p. 58, lines 16-21].* Upon being advised of the Bank's refusal of additional credit, he concealed from the Bank previously assigned accounts receivable proceeds [RT p. 87, line 21 to p. 88, line 24]. Petitioner was advised in advance and was aware that his actions in converting the Bank's property could constitute a nondischargeable debt [RT p. 19, lines 7-13]. He admitted concealing the Bank's property long after demand for such property had been made upon him [RT p. 93, line 9 to p. 94, line 21]. Peti-

*All references to the Reporter's Transcript are abbreviated with the letters "RT" and refer to the Reporter's Transcript of the proceedings had before the Referee in Bankruptcy on August 5, 1971, unless otherwise indicated.

tioner, acting in concert with Allen, with the admitted intent to hinder the efforts of creditors to enforce their rights [RT p. 65, lines 10-13], transferred and concealed assets belonging to respondent in an undisclosed trust account [RT p. 87, line 21 to p. 88, line 13; p. 89, lines 18-22].

Petitioner's belated attempt in the Court of Appeals to excuse his conduct by asserting that he acted on the incompetent advice of his counsel, Allen, is not persuasive [Opening Brief on Appeal, p. 14; *See* also, *Petition for Writ of Certiorari,* pp. 14-15]. Petitioner is a sophisticated, well-educated businessman [RT p. 57, lines 14-23] who was advised by other counsel as to the probable consequences of his acts and chose to disregard such advice [RT Exs. 6 and 8]. In addition, the record shows that Allen was not merely petitioner's counsel, but rather was an active participant in the scheme to convert respondent's collateral. Under such circumstances, purported reliance on counsel is no defense.

Conclusion.

For each and all of the foregoing reasons, it is submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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